function equipment would not relegate them to providing a lower quality of service than that which could be provided by locating certain functions outside of the incumbent LEC premises.[17] BellSouth does not provide any explanation of how it would be harmed by allowing certain types of multi-function equipment to be collocated, many of which, as noted, require no more space, and in fact, take up less space, than single function equipment. As stated above, without the ability to collocate equipment with multiple functions, not only would CLECs be unable to provide the same quality and range of services,[18] but they also would be unable to provide services of sufficient quality to compete with the ILEC. Thus, BellSouth's position reflects an effort to interpret section 251(c)(6) for its own strategic benefit, rather than any legitimate fear that its property would be taken needlessly due to an overinclusive definition of the statutory term "necessary."

As commenters have recognized, the Commission must adopt a flexible standard; that is, one that not only applies to the present technology and equipment, but also is responsive to changes in the telecommunications marketplace and the evolution of network equipment. As Cisco affirms, "[m]anufacturers and service providers have favored multifunctional equipment precisely because it offers capabilities that are most efficiently and effectively performed as an integrated set of functions."[19] Without the ability to collocate state-of-the-art multi-function equipment, CLECs would be relegated to moribund or obsolete equipment, while incumbent LECs would be able to take advantage of modern equipment specifically designed with a wide range of capabilities. This would prevent CLECs from offering the same products and services

---

16 AT&T Comments at 27; *see also* Comments of Corecomm, Inc., Vitts Networks, Inc., and Logix, Inc. at 20-21 (stating that CLECs should be permitted to collocate equipment that contains, among other things, remote switching modules).

17 *See* BellSouth Comments at 5.

18 *See, e.g.*, ATG Comments at 3; AT&T Comments at 22.

as the incumbents, and would be discriminatory, unjust, and unreasonable, in violation of section 251(c)(6).

B. The Commission Should Not Seek To Distinguish Between Single-Function and Multi-Function Equipment.

CompTel urges the Commission to reject any putative distinctions between single-function and multi-function equipment. So long as a CLEC has established interconnection with the ILEC through its collocation arrangement, the CLEC should be able to collocate any telecommunications equipment that will help maximize its collocation throughput. Modern telecommunications equipment increasingly defies easy categorization as "single" or "multi" functional. In fact, it is the rare piece of equipment that cannot be broken down into several discrete functionalities that are being provided or made available. As a result, the Commission should not try to determine whether certain equipment is single-function or multi-function equipment, but rather enable CLECs to collocate any equipment that will permit them to take maximum advantage of their collocation arrangement.

The comments of several parties support CompTel's proposal that the Commission permit CLECs to collocate any telecommunications equipment or functionalities within the collocation arrangement where the CLEC has established interconnection with the incumbent LEC. For example, CLECs demonstrate that various types of switching equipment, including "soft switches," are necessary for them to use their collocation arrangement to provide the services they desire to offer.[20] As McLeod USA explains, "soft-switching functionality separates some line-connection and switching matrix functions, allowing the functionality of the

---

19 Cisco Comments at 7.

20 *See, e.g.*, Comments of McLeodUSA at 4. *See also* Comments of Tachion Networks, Inc. at 2 (explaining the wide range of functions available in the equipment it develops).

switch to be deployed in physically separate locations."[21] By virtue of collocating this equipment in the CLEC's existing interconnection arrangement, CLECs can increase efficiency and throughput. Without the ability to collocate this equipment within their collocation arrangement, CLECs would not be able to maximize the functionality of the equipment, and thus, their throughput would be reduced rather than maximized.

Additionally, in those instances where CLECs already have invested in certain existing equipment, they should have the ability to add new functionalities by collocating additional equipment rather than being forced to replace their existing equipment with multi-function equipment. Of course, over time CLECs certainly would seek to replace the single function equipment with more advanced equipment when it is economically, financially and technically appropriate to do so. Until that time arrives, however, the Commission should give CLECs maximum flexibility to determine which telecommunications equipment they need to collocate in order to maximize their collocation throughput.

C. The Collocation Throughput Approach Supports the Use of Cross-Connects.

As CompTel stated in its comments, without cross-connects, CLECs would be unable to share each other's resources, and instead, they would have to perform all of the necessary functions themselves within their own collocation arrangements. This would create an economically inefficient and supra-optimal demand for scarce ILEC central office collocation space.[22] The Commission should reject ILEC arguments seeking to prohibit cross-connects between collocated carriers. If CLECs are permitted to engage in cross-connects, CLECs already collocated within the incumbent LEC central office would have the ability to connect to

---

21 *Id.*

a functionality that one CLEC might have that another CLEC does not have (but nonetheless could lawfully acquire by placing additional equipment at the expense of the property of the incumbent LEC). This will enable CLECs to take advantage of capacity and capabilities of other CLECs' equipment, and in turn, will reduce the demand for space in the incumbent LEC central office.

Similarly, though the Commission did not address this issue in the *Collocation Order*, the Commission should allow those CLECs that are "virtually" collocated, either through an actual virtual collocation arrangement or, *de facto*, through the purchase of all of the ILEC network elements (e.g., UNE-P), to cross-connect to the collocation arrangement of another CLEC. Such a rule would serve to minimize CLEC dependence on ILEC UNEs, thus only using those ILEC network functionalities that essentially are "necessary" for a CLEC to be able to provide the services it seeks to offer.

II. COMPTEL SUPPORTS THE ADOPTION OF A BROADBAND UNE.

Pursuant to the *UNE Remand Order*, incumbent LECs are required to provide requesting carriers with access to unbundled packet switching in some situations where the incumbent LEC has placed its DSLAM in a remote terminal.[23] CompTel requests that the Commission shore up the loose ends of this requirement by clarifying that the incumbent LEC must provide requesting carriers with access to unbundled packet switching in any instance where the splitting is conducted remotely, whether at a remote terminal or otherwise.

Incumbent LECs must be required to offer packet-switching as a UNE to those CLECs that are unable to collocate in the remote terminal. Access to packet-switching as a UNE

---

22 CompTel Comments at 10.

would enable CLECs to take advantage of the full functions remotely placed. Without such access, however, CLECs would be impaired as they would be forced to submit to a less efficient and inferior network configuration.

With regard to the deployment of next generation digital loop carrier ("NGDLC") systems, a CLEC does not obtain collocation for its equipment on the same terms and conditions that apply to the ILEC's own DSLAM, unless the CLEC actually collocates within the remote terminal *and* is able to access all of the subloops served by that remote terminal from the remote terminal. In the case of SBC's Project Pronto, by using splice points rather than cross-connect panels, SBC has ensured that no carrier can collocate efficiently in the remote terminal. The CLECs unable to collocate in the remote terminal are at a material disadvantage to the incumbent LEC. Therefore, the Commission should require all ILECs to offer the same broadband service that SBC has been required to offer, and to do so as a UNE combination subject to Section 251(c)(3).

CompTel further supports those comments arguing that, for the loop, subloop, and the NGDLC, CLECs must be able to have access to the full features and functionalities, which could be purchased as a UNE combination.[24] Specifically, CLECs must have access to all of the features and functionalities of NGDLC systems as individual UNEs. Access to all features and functionalities includes all technically feasible transmission speeds and QoS classes, such as Constant Bit Rate and real time and non-real time Variable Bit Rate that exist in the attached electronics of the loop.[25] As the Joint Commenters noted, it is irrelevant whether the incumbent LEC is not itself using certain features, functions and capabilities within the broadly defined

---

23 *UNE Remand Order* at para. 313.

24 *See, e.g.*, Joint Commenters at 64; Comments of IP Communications Corporation at 9.

25 *See, e.g.*, Comments of IP Communications Corporation at 9.

subloop.[26] The incumbent LEC has the ability to use the features if it desires; CLECs merely seek that same capability.

Without full access to these features and functionalities, CLECs would be unable to address those customers who are served off of the "new network" configuration from the central office. It would be extremely unfair if a CLEC's collocated equipment were to be subject to "stranding" or premature obsolescence simply because an ILEC has chosen to deploy a different network architecture. Thus, a "workaround" is necessary in the form of all of the elements used for either voice or data services from the central office to the customer premises in an already combined manner accessible from existing CLEC collocation arrangements.

III. CLECS SHOULD HAVE ACCESS TO UNBUNDLED WAVELENGTHS.

CLECs should have access to unbundled optical wavelength capacity. It is critical for CLECs to have the opportunity to distinguish themselves from the ILECs by, *inter alia*, having full access to the features, functions, and capabilities of the network. Already many CLECs offer a wide variety of products and services to satisfy individual customer needs that might not be available through the ILEC simply because the ILEC either has chosen not to use all of the capabilities of its network, or has configured its use of the network to optimize service to a particular class of customers. For example, an ILEC might want to serve large numbers of customers that require only a faster download speed than they currently receive. In comparison, a CLEC may want to serve a smaller number of customers that have higher bandwidth needs.

Purchasing a dedicated amount of bandwidth would enable a carrier to offer services that it would be unable to otherwise offer. In particular, by purchasing a dedicated

---

[26] Joint Commenters at 62.

amount of bandwidth called a "virtual private path," a CLEC could offer guaranteed minimum bit rate services to its customers. Many business customers demand a guaranteed level of bit rate capacity. A CLEC would be able to offer these services with a private virtual path. Similarly, even if only the UBR class of service were to be available, a CLEC still would be able to distinguish its service offering by providing a different rate of oversubscription to its customers than the ILEC offers. Without access to a virtual private path, CLECs would be unable to offer "business class," that is, guaranteed minimum bit rate, data services. Thus, if a CLEC wants to be able to offer service to all prospective business customers, it must be able to purchase a dedicated amount of bandwidth, so that it could provide guaranteed service levels.

CONCLUSION

For the foregoing reasons, the Commission should require CLECs to collocate multi-function equipment and to engage in CLEC-to-CLEC cross-connections. The Commission also should adopt a broadband UNE and permit CLECs access to unbundled wavelengths of the local loop.

COMPETITIVE TELECOMMUNICATIONS ASSOCIATION

By: _____

Carol Ann Bischoff
Jonathan Lee
COMPETITIVE TELECOMMUNICATIONS ASSOCIATION
1900 M Street, N.W.
Suite 800
Washington, D.C. 20036
(202) 296-6650

Robert J. Aamoth
Jennifer M. Kashatus
KELLEY DRYE & WARREN LLP
1200 19th Street, N.W.
Suite 500
Washington, D.C. 20036
(202) 955-9600

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Coalition of Competitive Fiber Providers' Petition for Declaratory Ruling Concerning Application of Sections 251(b)(4) and 224(f)(1) of the Communications Act of 1934, as amended, to Central Office Facilities of Incumbent Local Exchange Carriers	)	CC Docket No. 01-77

COMMENTS OF QWEST COMMUNICATIONS INTERNATIONAL INC.

Sharon J. Devine
James T. Hannon
Suite 700
1020 19th Street, N.W.
Washington, DC 20036
(303) 672-2860

Attorneys for

QWEST COMMUNICATIONS
INTERNATIONAL INC.

April 23, 2001

TABLE OF CONTENT

SUMMARY

The Commission should decline to expand the scope of Sections 224(f)(1) and 251(b)(4) as petitioners request. As both a CLEC and a competitive provider of local transport, Qwest shares many of the petitioners' concerns regarding their ability to interconnect with collocators in ILEC COs. Qwest's own experience as a CLEC demonstrates that alternative sources of fiber transport can promote market entry and help overcome obstacles that might otherwise delay the availability of new competitive services to consumers. On the other hand, as a major ILEC, Qwest will suffer significant harm if the Commission follows the petitioners' proposed course of action. Thus, Qwest is in the position of having to balance the need and desire of a CLEC and a CFP for access to collocation space in ILECs' COs and the totally lawful desire of an ILEC to control the use of its own private property.

While the Petition may have "pro-competitive" attributes, it is neither legally sound nor in the public interest and should be rejected by the Commission. Not only do petitioners urge the Commission to enter into perilous constitutional waters by dramatically expanding the scope of LEC property that is subject to taking under Section 224, but they also ask the Commission to find a new collocation right that would extend collocation obligations to all LECs, not just to ILECs. Furthermore, the Commission does not need to adopt petitioners' legal position to accommodate the needs of CFPs to interconnect with collocators in ILECs' COs.

There is only one provision of the Act, Section 251(c)(6), that allows other telecommunications carriers a right to occupy space in ILECs' COs. Neither Section 224 nor Section 251(b) address rights of access to the CO itself; these Sections can only be read to address telecommunications carriers' rights of access to poles, conduits, and rights-of-way running through other property. As with any other statutory provision authorizing the taking of

private property, the Commission must narrowly construe this statutory scheme to limit the extent to which the property of ILECs will be subject to physical occupation. Clearly, what petitioners ask for in this proceeding is a broad expansion of the Commission's authority to take private property that cannot be reconciled with the Court's holdings in *GTE* and *Bell Atlantic*.

Any rights that a CFP may have to access collocation space in an ILEC CO flow from Section 251(c)(6) and the rules that the Commission has promulgated in implementing this statutory provision. As such, a CFP has a right to bring its fiber into an ILEC CO if it is also a CLEC and has leased collocation space or if a collocator has entered into an agreement to lease facilities from the CFP. The ILEC may not unduly restrict collocators in their choice of transport providers by requiring CFPs to comply with unnecessary and uneconomically burdensome procedures or methods for gaining access to collocation space.

CFPs may be leasing facilities to numerous collocators in a single ILEC CO. In such cases, it is in the interest of both CFPs and the ILECs to allow CFPs to interconnect with collocating carriers in the most efficient manner. Verizon's CATT service appears to be an efficient means of allowing CFPs to serve multiple collocators in a single CO. If services similar to CATT were made available to CFPs by other ILECs, the process of serving multiple collocators would be simplified for both CFPs and ILECs.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Coalition of Competitive Fiber	)	
Providers' Petition for Declaratory	)	
Ruling Concerning Application of	)	CC Docket No. 01-77
Sections 251(b)(4) and 224(f)(1) of	)	
the Communications Act of 1934, as	)	
amended, to Central Office Facilities	)	
of Incumbent Local Exchange Carriers	)	

COMMENTS OF QWEST COMMUNICATIONS INTERNATIONAL INC.

Qwest Communications International Inc. ("Qwest"), through counsel and pursuant to the Federal Communications Commission's ("Commission") *Public Notice* ("*Notice*"),[1] hereby submits its comments on the Petition for Declaratory Ruling ("Petition") filed by the Coalition of Competitive Fiber Providers (or "petitioners").[2]

I. INTRODUCTION

In their Petition, the Competitive Fiber Providers ask the Commission to adopt an overly-broad interpretation of the access requirements imposed on all local exchange carriers ("LEC") by Sections 251(b)(4) and 224 of the Communications Act.[3] As both a competitive LEC ("CLEC") and a competitive provider of local transport, Qwest shares many of the concerns of competitive fiber providers (or "CFPs") regarding their ability to interconnect with collocators in

---

[1] *Public Notice, Pleading Cycle Established for Comments on Petition of Coalition of Competitive Fiber Providers for Declaratory Ruling of Sections 251(b)(4) and 224(f)(1)*, CC Docket No. 01-77, DA 01-728, rel. Mar. 22, 2001.

[2] Petition for Declaratory Ruling filed Mar. 15, 2001.

[3] 47 U.S.C. § 251(b)(4); 47 U.S.C. § 224(f)(1).

incumbent LEC ("ILEC") central offices ("CO"). Qwest's own experience as a CLEC demonstrates that alternative sources of fiber transport can promote market entry and help overcome obstacles that might otherwise delay the availability of new competitive services to consumers.[4] Qwest has used the facilities of other competitive fiber providers in many out-of-region locations[5] to extend the reach of its own network.

On the other hand, as a major ILEC, Qwest also will suffer significant harm if the Commission follows the petitioners' proposed course of action.[6] Thus, Qwest is in the position of having to balance the need and desire of a CLEC and a CFP for access to collocation space in ILECs' COs and the totally lawful desire of an ILEC to control the use of its own private property. The balancing of these interests within Qwest is very much like the balancing which the Commission faces in determining whether the instant Petition has any merit under either the letter or spirit of the 1996 Act.

Evaluating the Competitive Fiber Providers' Petition from any reasonable perspective leads to one conclusion -- the approach that petitioners advocate is neither legally sound nor in the public interest. Not only do petitioners urge the Commission to enter into perilous constitutional waters by dramatically expanding the scope of LEC property that is subject to

---

[4] Qwest's ability to easily interconnect with CFPs in COs (in which Qwest is collocated) in Verizon's service area has enabled Qwest to make services available to its customers much earlier than would have otherwise been possible.

[5] The term "out-of-region" refers to the operations of Qwest affiliates that are outside Qwest Corporation's 14-state region where it operates as an ILEC.

[6] On June 30, 2000, Qwest Communications International Inc. merged with U S WEST, Inc. With this merger Qwest, which already was a large interexchange carrier ("IXC") and CLEC, acquired U S WEST Communications, Inc. (later renamed Qwest Corporation), a Bell Operating Company and ILEC. The resulting merged entity is fairly unique in that Qwest is now a major ILEC, IXC, CLEC, and a CFP (as petitioners use the term).

taking under Section 224,[7] but they also ask the Commission to find a new collocation right that would extend collocation obligations to all LECs (and possibly to all utilities subject to Section 224), not just to ILECs as is the case under Section 251(c)(6). The Commission should reject petitioners' request. It is not necessary to follow this course of action to accommodate the needs of CFPs to interconnect with collocators in ILECs' COs.

Qwest is of the opinion that reiteration, or possibly clarification, of the Commission's existing collocation rules is sufficient to make clear that CFPs can directly connect to CLECs collocated in ILECs' COs. In the comments that follow, we address both the legal foundation of the Competitive Fiber Providers' Petition and their business objective of interconnecting with collocated CLECs in an efficient manner.

II. NEITHER SECTION 251(b)(4) NOR SECTION 224 GRANT PETITIONERs AN INDEPENDENT RIGHT OF ACCESS TO ILECs' COs

Petitioners ask the Commission to find that Sections 251(b)(4) and 224(f)(1) give CFPs (who are not already collocated) a right of access to install their fiber and associated equipment (*e.g.*, connector blocks and distribution frames) in ILECs' COs. Petitioners assert that this right is independent of any collocation rights that they might have under Section 251(c)(6) of the Act. Petitioners contend that the Commission should address the issues raised in its Petition because there is "both a controversy and uncertainty" concerning the rights of CFPs under Sections 251(b)(4) and 224(f)(1). Petitioners' arguments should be rejected as contrary to clear language of the Act.

Prior to the Competitive Fiber Providers' Petition, Qwest was not aware that there was any controversy as to the legal basis for gaining access to ILECs' COs. There is only one provision of the Act -- Section 251(c)(6), the Act's collocation provision -- that allows other

[7] *Gulf Power Co. v. FCC*, 208 F.3d 1263 (11th Cir. 2000).

telecommunications carriers a right to occupy space in ILECs' COs.[8] Petitioners' attempt to create a new legal right out of thin air by cobbling together Sections 251(b)(4) and 224 does not withstand legal scrutiny. Section 251(c)(6) is the only provision of the Communications Act that specifically addresses the scope of competing carriers' rights of access to "the premises of the local exchange carrier" for collocation purposes. Congress carefully delimited the scope of those rights, largely to "avoid an unnecessary taking of private property."[9]

Neither Section 224 nor Section 251(b) addresses rights of access to the CO itself; the more general provisions of these Sections can only be read to address rights of access to poles, conduits, and rights-of-way running through other property. Any broader construction of those provisions would violate both (1) the long-standing principle of statutory interpretation which requires that more specific provisions take precedence over the more general provisions and (2) the rule (reaffirmed in both *GTE* and *Bell Atlantic*) against broadly interpreting generally-worded federal statutes to authorize unnecessary takings of private property. Indeed, the petitioners seek the same broad relief that the Court found to be unlawful under Section 251(c)(6) in *GTE*.

Petitioners' statutory argument is barred by the plain meaning of the statutory text. What petitioners seek is collocation by another name. Section 251(c)(6) both creates specific rights of physical collocation and carefully limits their scope. Those limits reflect a deliberate congressional policy choice that the Commission is bound to respect. But, even apart from those considerations, constitutional concerns *independently* require the Commission to reject the Petition. As with any other statutory provision authorizing the taking of private property, the

---

[8] Section 251(c)(6) is an explicit congressional authorization allowing CLECs to collocate in ILECs' COs.

[9] *See GTE v. FCC*, 205 F.3d 416, 423 (D.C. Cir. 2000); *see also Bell Atlantic Telephone Companies v. FCC*, 24 F.3d 1441, 1445-46 (D.C. Cir. 1994).

Commission must narrowly construe this statutory scheme to limit the extent to which the property of ILECs and other LECs will be subject to physical occupation.

In *Bell Atlantic*,[10] the D.C. Circuit rejected the Commission's attempt (in its *Expanded Interconnection* proceeding) to create rights of physical collocation without express statutory authorization.[11] The Court arrived at that holding *not* because the Communications Act itself precluded the Commission's recognition of such rights — the statute was in fact silent or ambiguous on that point -- but because the Commission lacks authority to resolve statutory ambiguities to expand rights of physical access to private property. The Court reasoned that a "narrowing construction" of statutory access rights is required whenever "administrative interpretation" would otherwise create "an identifiable class of cases in which application of a statute will necessarily constitute a taking" of private property.[12] Any other approach, the Court explained, would inappropriately permit administrative agencies to use "statutory silence or ambiguity to expose the Treasury to liability both massive and unforeseen."[13]

Six years after passage of the 1996 Act, in *GTE v. FCC*,[14] the D.C. Circuit reaffirmed the same point. In the 1996 Act, Congress created an explicit right of physical collocation in ILECs' COs, but it limited the scope of that right to collocation that is "necessary" for interconnection or

---

[10] *Bell Atlantic*, 24 F.3d at 1445-46.

[11] In *Bell Atlantic* the Commission argued that taking authority need not be express but could be implied. The Court rejected this argument finding that such an implication could only be made as a matter of necessity ("where 'the grant [of authority] itself would be defeated unless [takings] power were implied;" *Id.* at 1446, citing *Western Union Tel. Co. v. Pennsylvania R.R.*, 120 F. 362, 373; *affd.* 195 U. S. 540).

[12] *Id.* at 1445 citing *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985).

[13] *Id.*

[14] *See* note 9 *supra*.

access to network elements.[15] The Commission interpreted the new collocation rights broadly, and the D.C. Circuit again repudiated the Commission's approach. The Court reasoned, as it had in *Bell Atlantic*, that statutory provisions invoked to support collocation rights must be carefully construed to avoid any "*unnecessary* taking of private property."[16]

Clearly, what petitioners ask for in this proceeding is a broad expansion of the Commission's authority to take LECs' private property that cannot be reconciled with the Court's holdings in *GTE* and *Bell Atlantic*. With respect to the issue at hand -- whether Sections 251(b)(4) and 224 provide a right for occupation of LECs' COs -- Congress has remained silent. As such, the Commission may not lawfully find such a right through implication, particularly when it would entail a broad expansion in the Commission's takings authority to all LECs, not just ILECs (as is the case with Section 251(c)(6)).

The basic lesson of both *Bell Atlantic* and *GTE* is that the Commission may place Treasury funds at risk for just compensation awards *only to the extent that Congress has unambiguously authorized it to do so*. In both cases, the Commission erred by creating rights of physical occupation that Congress had not expressly authorized. The Commission would make the same fatal mistake here if it were to grant the instant Petition. What petitioners seek are rights of "exclusive physical occupation"[17] beyond the carefully delimited collocation rights that Congress delineated in Section 251(c)(6). The statute plainly precludes granting petitioners those extra rights.[18] And here, as in *Bell Atlantic* and *GTE*, the Commission must follow a

---

[15] 47 U.S.C. § 251(c)(6).

[16] *GTE*, 205 F.3d at 423 (emphasis in original); *see also id.* at 421.

[17] *Bell Atlantic*, 24 F.3d at 1446.

[18] But even if it did not, the best that can be said for petitioners' position is that the statute as a whole -- including Sections 224, 251(b)(4), and 251(c)(6) -- does not clearly support it.

narrow construction of its statutory authority to expose the Treasury to claims for just compensation under the Tucker Act.

Finally, there is no basis for arguing that the constitutional concerns expressed in *Bell Atlantic* are absent because ILECs "will obtain compensation *from the [competing carrier]* for the reasonable costs of co-location."[19] The same argument was raised, and rejected, in *Bell Atlantic* itself.[20] As the D.C. Circuit there explained, "the LECs would still have a Tucker Act remedy for any difference" between what they ultimately receive from those competing carriers "and the level of compensation mandated by the Fifth Amendment."[21] That shortfall could arise in any number of circumstances: it could arise, for example, if the compensation amount ordered by regulators is found to fall short of the constitutionally-prescribed level, or if a competing carrier becomes insolvent before it pays any amount at all to the incumbent whose property has been taken. In any event, D.C. Circuit precedent on this point is clear: even where collocation is accompanied by regulatory compensation, the Commission may not grant rights of physical access to the COs in contexts where Congress has left any doubt about its authority to do so. As such, petitioners' request for a declaratory ruling must be denied.

III. PETITIONERs CANNOT OBTAIN THE FULL RELIEF THAT THEY REQUEST WITHOUT AN IMPERMISSBLY BROAD RE-DEFINITION OF THE STATUTORY TERMS "CONDUIT," "DUCT" AND "RIGHT-OF-WAY"

Assuming arguendo that Sections 251(b)(4) and 224 grant a right of access to LECs' COs, petitioners still could not obtain the relief that they seek without an impermissibly broad construction of such statutory terms as "conduit," "duct" and "right-of-way". Petitioners acknowledge that Commission regulations define "conduit" as "a structure containing one or

[19] *Bell Atlantic*, 24 F.3d at 1445 n.3.

[20] *Ibid.*

[21] *Ibid.*

more ducts, usually placed in the ground, in which cables or wires may be installed."[22] Industry-wide usage makes clear that a "conduit" is "[a] pipe, usually metal but often plastic, that runs either from floor to floor or along a floor or ceiling to protect cables."[23] But petitioners would define the term to include such items as "clips, straps, or racks," solely on the ground that they are "structure[s]" that "hold wiring."[24] Their definitional approach necessarily embraces far too much to remain plausible. The CO itself is a "structure" that "holds wiring." Because petitioners detach their construction from the common usage of the term, the logical consequence of their approach is to include the entire CO *as such* within the definition of "conduit." Such an outcome is absurd and would not withstand judicial scrutiny if the Commission adopted petitioners' proposed definitions.

Similarly unpersuasive is petitioners' effort to characterize "clips, straps, and racks" as "ducts." Such items are obviously not "enclosed raceway[s]" within the Commission's regulatory definition.[25] The Commission has further explained that a "conduit consists of one or more ducts, which are the *enclosures* that carry the cables."[26] In the *Competitive Networks Order*, the Commission concluded that "the obligations of utilities under Section 224 encompass in-building facilities, such as riser conduits, that are owned or controlled by a utility . . . . Our interpretation of Section 224 is also consistent with industry practice, in which the terms duct

---

[22] Petition at 9.

[23] *Newton's Telecom Dictionary* 217 (16 1/2 ed. 2000).

[24] Petition at 9-10.

[25] 47 C.F.R. § 1.1402(k).

[26] *In the Matter of Amendment of Rules and Policies Governing Pole Attachments, Report and Order*, 15 FCC Rcd. 6453, 6491-92 ¶ 77 (2000) (emphasis added).

and conduit are used to refer to a variety of *enclosed* tubes and pathways, regardless of whether they are located underground or aboveground."[27]

As to the scope of the term "right-of-way," the Commission held in the *Local Competition Order*:

> We do not believe that section 224(f)(1) mandates that a utility make space available on the roof of its corporate offices for the installation of a telecommunications carrier's transmission tower, although access of this nature might be mandated pursuant to a request for interconnection or for access to unbundled elements under section 251(c)(6). The intent of Congress in section 224(f) was to permit cable operators and telecommunications carriers to "piggyback" along distribution networks owned or controlled by utilities, as opposed to granting access to every piece of equipment or real property owned or controlled by the utility.[28]

However, in its recent *Competitive Networks Order*, the Commission, while reaffirming that general point, nonetheless determined that "a 'right-of-way' under Section 224 includes property owned by a utility that the utility uses in the manner of a right-of-way as part of its *transmission* or *distribution* network."[29] Petitioners argue that "any wiring or transmission facilities *in ILEC central offices* extending from or to switches is distribution plant" for these purposes.[30] Petitioners' interpretation of "distribution" is unreasonably broad. In other contexts, the Commission has used that term to denote facilities lying well outside the CO.[31] It is unclear,

---

[27] *In the Matter of Promotion of Competitive Networks in Local Telecommunications Markets, First Report and Order*, 15 FCC Rcd. 22983, 23019 ¶ 8074 (2000) (emphasis added) ("*Competitive Networks Order*").

[28] *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, First Report and Order*, 11 FCC Rcd. 15499, 16084-85 ¶ 1185 (1996) (footnotes omitted).

[29] *Competitive Networks Order*, 15 FCC Rcd. at 23021 ¶ 83 (emphasis added).

[30] Petition at 12 (emphasis added).

[31] *See, e.g., In the Matters of Deployment of Wireline Services Offering Advanced Telecommunications Capability, Third Report and Order*, 14 FCC Rcd. 20912, 20914 n.4 (1999) ("Digital transmission technologies have been used for some time in the network 'backbone'

however, what (if any) additional facilities the Commission may have intended to include when it extended the scope of Section 224 — almost as an afterthought -- to the "transmission . . . network." Clearly, petitioners find no support for their overly-broad definition of right-of-way in case law or industry usage.[32]

IV. COLLOCATORs HAVE THE RIGHT TO DIRECTLY INTERCONNECT WITH AND OBTAIN TRANSPORT FACILITIES FROM THE PROVIDER OF THEIR CHOICE

Any rights that a competitive fiber provider may have to access collocation space in an ILEC CO flow from Section 251(c)(6) and the rules that the Commission has promulgated in implementing this statutory provision. As such, a CFP has a right to bring its fiber into an ILEC CO if it is also a CLEC and has leased collocation space or if a collocator has entered into an agreement to lease facilities from the CFP. In the former case, as both a CLEC and a CFP the

---

facilities, and now are starting to appear in the local feeder and distribution plant."); *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Third Report and Order and Fourth Further Notice of Proposed Rulemaking*, 15 FCC Rcd. 3696, 3789-90 ¶ 206 (1999) (explaining that the feeder distribution interface is the point where the "trunk line . . ., leading back to the central office, and the 'distribution' plant, branching out to subscribers, meet"); *Public Notice, Common Carrier Bureau and Office of Engineering and Technology Announce Public Forum on Competitive Access to Next-Generation Remote Terminals*, 15 FCC Rcd. 23208, 23209 (2000) ("Digital loop carrier systems pose additional difficulties for unbundling for competitive LECs who want to access the loop in the incumbent LEC's central office, because the copper loop to the subscriber (which is needed for xDSL- based services) is only available in the distribution plant, between the remote terminal (or optical network unit) and the network interface device at the customer's premises."). *Cf. Newton's Telecom Dictionary* 279 (16 1/2 ed. 2000) (defining "distribution" as, *inter alia*, "[t]he portion of a switching system in which a number of inputs is given access to an equal number of outputs").

[32] These substantive definitional problems point out an additional procedural defect with the Petition. Petitioners are plainly seeking a substantive *change* in the Commission's rules, not the type of "clarification" that may appropriately be sought through a petition for declaratory judgment. The proper vehicle for such proposals is a rulemaking proceeding, not a petition for declaratory judgment. *See, e.g., In the Matter of GVNW Inc./Management Petition for Declaratory Ruling, or Alternatively, a Waiver of Section 36.612(a) of the Commissions Rules USF Data Collection, Order*, 11 FCC Rcd. 13915, 13918 ¶ 10 (1996) (petition for declaratory ruling is inappropriate where petitioner seeks "[s]ubstantive modifications" to Commission rules; such modifications "require a rulemaking").

CFP has an independent right of access. In the latter case, the CFP stands in the shoes of the collocator and is acting as his agent or subcontractor. The ILEC may not unduly restrict collocators in their choice of transport providers by requiring CFPs to comply with unnecessary and uneconomically burdensome procedures or methods for accessing collocation space.[33]

Consistent with our advocacy in the collocation proceeding, it is Qwest's position that the collocation provisions of the Act, when properly interpreted, provide considerable flexibility for CLECs and CFPs to access each other on reasonable terms in the central office. In the collocation proceeding, Qwest argued that it would not be just and reasonable to deny a collocator who otherwise meets the "necessary" standard (i.e. for interconnection or access to UNEs) additional incidental (and reasonable) uses of the collocation space, such as cross-connects to other CLECs that are otherwise lawfully collocated in the central office.[34] Qwest

---

[33] Qwest discussed this issue at length in its comments in the Collocation Remand proceeding which are attached hereto. For example in its comments, "Qwest urge[d] the commission to require incumbent LECs to:

- honor the ROW/conduit access provisions of the interconnection agreements and prohibit the incumbent LECs from requiring separate, duplicate contracts in order to obtain access to manholes; and

- ensure that CLECs can continue to have the option of having ROW/or conduit access issues addressed as part of a single, comprehensive interconnection agreement that must be filed and approved by the state commissions."

Id. at 20-21.

[34] *See* Qwest Comments in the Collocation Remand proceeding, CC Docket Nos. 98-147 and 96-98, filed Oct 12, 2000, at 16-17 ("Qwest Collocation Comments") "The Act, however, does not allow a CLEC to obtain collocation from an ILEC for the *sole or primary purpose* of cross-connecting to other CLECs. Indeed, cross-connecting to other CLECs does not equate to interconnection with the [incumbent] local exchange carrier's network, [47 U.S.C. § 251(c)(2)] or access to the unbundled network elements of the incumbent LEC; [47 U.S.C. § 251(c)(3)] nor can it be argued that cross-connects are necessary to access the UNEs of, or achieve interconnection with, the incumbent LEC as required by section 251(c)(6). [Footnote omitted.] Where a CLEC does not otherwise meet the standards set forth in that provision, there can be no justification (or authority) for requiring the incumbent LEC to permit such cross-connects."

submits that such an incidental use of the space includes CLEC to CLEC cross-connects which allow a collocated CLEC to reach a CFP's facilities through another CLEC's collocation space. By this method, a CFP may effectively interconnect with several CLECs lawfully collocated in a CO without collocating or running fiber to multiple collocation arrangements.

Thus, petitioners are incorrect to the extent that they contend that the Commission's rules prevent them from reaching their customers that are collocated in ILECs' COs. However, if a specific ILEC's procedures obstruct CFPs from serving collocated customers, it is a matter for a complaint proceeding not a declaratory ruling.

V. VERIZON's CATT SERVICE IS A REASONABLE AND FEASIBLE MEANS OF ALLOWING CFPs TO EFFICIENTLY SERVE COLLOCATORS

Competitive fiber providers may be providing service to numerous collocators in a single ILEC CO. In such cases, it is in the interest of both the CFPs and ILECs to allow the CFPs to interconnect with collocating carriers in the most efficient manner. Verizon's Competitive Alternate Transport Terminal ("CATT") service appears to be an efficient means of allowing CFPs to serve multiple collocators in a single CO. This service allows CFPs to access a shared splice point, the CATT, in the CO for the purpose of terminating competitive fiber for distribution to individual collocators.[35] If services similar to CATT were made available to CFPs by other ILECs, the process of serving multiple collocators would be simplified for both the CFPs and the ILECs.[36]

As was mentioned above, Qwest uses third-party fiber providers to deploy local networks in areas where it has not yet completed construction of its own network facilities. In Verizon's

[35] The CATT can be found at URL: http://www.BellAtlantic.com/wholesale/html/customer_doc.htm . Click on CLEC Handbooks, Volume 3, then go to Section 4.6.